STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2014
v	No. 314180 Oakland Circuit Court
MELVIN ROBERT MATSEY, Defendant-Appellant.	LC Nos. 2011-238444-FH 2011-238886-FH 2012-240963-FH 2012-241005-FH

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of four counts of breaking and entering a building with intent to commit a larceny, MCL 750.110. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 5 to 40 years' imprisonment. Defendant appeals by right, and we affirm.

Defendant was charged in four separate informations with breaking and entering a building with intent to commit a larceny, MCL 750.110, for crimes that occurred on June 15, 2007, in Farmington Hills, on August 8, 2010, in Madison Heights, on April 16, 2011, in Novi, and on June 20, 2011, in Southfield. The prosecution moved to consolidate the cases for trial, MCR 6.120, alleging that defendant was involved in a series of acts constituting parts of a single scheme or plan. Defendant opposed the motion for consolidation, alleging that his conduct did not fall within the scope of the court rule and one trial would deprive him of due process of law. In a written order, the trial court granted the motion for the reasons indicated on the record. Additionally, the prosecution sought to admit MRE 404(b) evidence, specifically defendant's prior convictions involving breaking and entering and the concurrent charged offenses. The prosecution argued that the evidence was relevant and the probative value was not substantially outweighed by unfair prejudice. Again, the defense opposed this motion, contending that the evidence was irrelevant and prejudicial. In a written order, the trial court granted the motion for the reasons stated on the record.

At trial, it was established that alarm systems for four businesses were triggered after work hours. When the police and the business owners arrived on the scene, a large rock or concrete object was found thrown through a glass window or door. Laptop computers were

stolen from three of the four businesses. Blood was discovered at all four locations, and the blood matched a DNA sample provided by defendant. Defendant's independent expert concluded that defendant was the donor of the blood found at the crime scenes. Additionally, at trial, the parties stipulated to admit six prior convictions for breaking and entering or attempted breaking and entering. The jury was advised that the convictions were presented for the limited purpose of demonstrating that the events did not occur by accident or mistake, but represented a planned system or characteristic scheme.

Defendant testified that he did not break and enter into the four businesses. Rather, at the Madison Heights business, he entered the building during business hours after he cut himself changing a tire. Additionally, defendant acted as a "middle man" for his friends who stole items. He denied breaking and entering into the Novi and Southfield locations, but alleged that he entered those premises after his friends had broken in earlier. Defendant testified that he believed that he previously pleaded guilty to the Farmington Hills charge that occurred in 2007, while he was in prison. Defendant admitted that he committed his prior convicted offenses, but with regard to the current crimes, he denied responsibility. Despite this testimony, defendant was convicted as charged.

On appeal, defendant only contests the trial court's rulings allowing consolidation of the trials and admission of MRE 404(b) evidence. The appellant is responsible for securing the entire transcript of the proceedings unless the trial court directs otherwise or the parties stipulate to less than the full transcripts. See MCR 7.210(B)(1). When a defendant fails to present the transcript, this Court has no record to review the claimed error and the issue has been abandoned. *People v Thompson*, 193 Mich App 58, 61; 483 NW2d 428 (1992). Affirmance is appropriate when a defendant fails to provide an adequate record including the transcript. See *People v Coons*, 158 Mich App 735, 740; 405 NW2d 153 (1987). Although defendant did not file the transcript of the hearing on the motions, we nonetheless address and affirm the trial court's rulings.

In *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009), our Supreme Court delineated the following standard of review for addressing MCR 6.120, the separate trial or joinder rule:

> Generally, this Court reviews questions of law de novo and factual findings for clear error. The interpretation of a court rule, like matters of statutory interpretation, is a question of law that we review de novo. To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute "related" offenses for which joinder is appropriate. Because this case presents a mixed question of fact and law, it is subject to both a clear error and a de novo standard of review.
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> Additionally, when this Court reviews preserved nonconstitutional errors, we consider the nature of the error and assess its effect in light of the weight and strength of the untainted evidence. [*Id*. (internal citations omitted).]

The ultimate ruling on a motion to sever is reviewed for an abuse of discretion. *Williams*, 483 Mich at 226 n 6.

MCR 6.120 governs joinder and provides, in relevant part:

> **(A) Charging Joinder.** The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
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> **(B) Postcharging Permissive Joinder or Severance.** On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
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> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
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> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
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> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

In *Williams*, 483 Mich at 228-229,[1] a search warrant was executed at a motel on November 4, 2004. When the police forced entry, the defendant was walking out of the bathroom where crack cocaine was found caught in the drain and in the toilet. Cocaine, a scale, razor blades, baggies, guns, ammunition, and cash were found in the room. On February 2, 2005, the defendant was observed walking into a home. The police executed a search warrant there and found the defendant reaching toward a bag containing suspected cocaine. Similar drug paraphernalia located in the motel room was also found in proximity to the defendant at this home, including guns, cash, baggies, and drugs. *Id*. The prosecutor moved to consolidate the cases pursuant to MCR 6.120 or alternatively to admit the evidence in the other trial pursuant to

[1] The *Williams* Court analyzed the prior version of MCR 6.120 which was amended effective January 1, 2006. The prior version stated that offenses were related if "based on (1) the same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan." The 2006 amendment essentially divided subsection (2) into two separate parts. Thus, the analysis with regard to the current rule is applicable. See *Williams*, 483 Mich at 233, n 5.

MRE 404(b). *Id*. at 229-230. The trial court granted the motion, holding that the offenses were related because the acts involved appeared to be "parts of a single scheme or plan; namely drug trafficking and therefore they would appear to be related offenses." The trial court also concluded that the evidence would be admissible MRE 404(b) evidence that would present a greater risk of prejudice. The Court of Appeals affirmed the trial court's ruling that the offenses were related. *Id*. at 230-231.

Our Supreme Court also affirmed, holding that a prior decision, *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977), was inconsistent with MCR 6.120. The Court held:

> In this case, the record reflects that the trial court correctly applied the plain language of MCR 6.120 to the facts presented when it concluded that the offenses charged were "related." After hearing arguments from the parties, the trial court specifically addressed the language of MCR 6.120(A) and (B). The court concluded that the offenses charged in both cases reflect defendant's "single scheme or plan" of drug trafficking. MCR 6.120(B)(2). Consequently, defendant had no right to sever these "related" offenses. MCR 6.120(B). The trial court noted that in light of the relevant facts, a single jury trial was appropriate and, further, the court stated that it would "be cautioning the jury that they need to find that both events have to meet the standard of proof beyond a reasonable doubt."
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> We conclude that the trial court did not violate the unambiguous language of MCR 6.120. The offenses charged were plainly "related" under MCR 6.120(B)(2). In both cases, defendant was engaged in a scheme to break down cocaine and package it for distribution. Evidence of acts constituting part of defendant's single scheme was found in both the motel room and the house at 510 Nevada. Even if one views defendant's first arrest in November and his second arrest in February in discrete moments in time, direct evidence indicated that he as engaging in the same particular conduct on those dates. The charges stemming from both arrests were not "related" simply because they were "of the same or similar character." Instead, the offenses charged were related because the evidence indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution. Accordingly, the trial court complied with what the language of MCR 6.120 unambiguously required. [*Id*. at 233-235.]

The *Williams* Court further rejected the assertion that the offenses had to be in temporal proximity to warrant consolidation. *Id*. at 241 ("Moreover the unambiguous language of MCR 6.120 does not mandate the existence of temporal proximity between several offenses."). Additionally, our Supreme Court held that even if the trial court erred in joining the cases, any error would be harmless because "the evidence of each charged offense could have been introduced in the other trial under MRE 404(b)." *Id*. at 243.

Applying the *Williams* decision and the court rule to the facts of this case, the trial court did not err by allowing the consolidation of the cases. We reject defendant's contention that the similarities in the manner of the breaking and entering and the objects taken do not show a common plan. Offenses are related if based on the "same conduct or transaction," or "a series of

connected acts," or "a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1)(a-c). Here, defendant's crimes were premised on the same conduct or a series of acts constituting parts of a single scheme or plan. Defendant engaged in a scheme to steal portable electronic equipment from closed businesses. That is, on the weekends when businesses were not occupied, defendant would use a large concrete object to smash windows or glass doors to gain entry into the business premises, grab portable electronic equipment such as laptop computers, and flee the premises before police or the business owners could arrive at the establishments. In the course of committing these acts, defendant would injure himself and leave DNA evidence. The experts for both the prosecution and the defense concluded that defendant was the donor of the DNA evidence left at the scene of the crimes. In light of the above, the trial court did not err by allowing the consolidation. This issue does not entitle defendant to appellate relief.

Next, defendant asserts that the trial court abused its discretion by admitting the MRE 404(b) evidence. We disagree. "The decision to admit evidence is reviewed for an abuse of discretion. When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). In *Williams*, 483 Mich at 243, our Supreme Court held that any error in consolidation would be harmless because the evidence of each charged offense could have been introduced pursuant to MRE 404(b). Indeed, "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). To establish a common scheme or plan, the common features should indicate the existence of a plan rather than a series of similar spontaneous acts. *Id*. at 65-66.

On this record, we cannot conclude that the trial court abused its discretion by admitting the MRE 404(b) evidence. *Williams*, 483 Mich at 243. The stipulation delineating defendant's prior convictions indicated a history of breaking into businesses after hours in an attempt to steal portable electronic equipment, including laptop computers. The entry would be obtained by breaking a window or glass door with a large rock or concrete object. *Sabin*, 463 Mich at 63, 65-66.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering